

1 the authority? Did you have the authority to
2 do that?

3 THE WITNESS: I suppose I could
4 have -- I suppose we could take it extended to
5 authority in the sense that I could say -

6 JUDGE SIPPEL: Well, don't try -

7 THE WITNESS: -- I don't like that
8 question. I don't want to see it on the
9 survey. I mean, it -- the way these things go
10 together is much more collegial in that
11 regard. And Dr. Gatseos and I worked together
12 to create a survey, so if he said I really
13 think that this question should be in here, I
14 would probably defer to him as someone more
15 knowledgeable than I in survey construction.
16 But, ultimately, I suppose I could have vetoed
17 a question, if he would have suggested it.

18 JUDGE SIPPEL: Are -

19 THE WITNESS: I wouldn't have done
20 so, but I suppose I could have.

21 JUDGE SIPPEL: Did you sign -- was
22 there any kind of a -- did you sign a retainer

1 agreement, or is there some kind of a
2 description of the work that you were being
3 retained to do?

4 THE WITNESS: That I was being
5 retained to do?

6 JUDGE SIPPEL: Yes, sir.

7 THE WITNESS: Yes. No, in my -- I
8 don't think there was ever a specific -- I'm
9 not sure there was a specific assignment in
10 the original retainer agreement. It's just my
11 firm's services were retained to assist in the
12 case, with -

13 JUDGE SIPPEL: Well, then how are
14 you -- how was it determined as to what
15 services or abilities of your's was going to
16 be called upon, because they're paying you by
17 the hour, I take it, something like that.

18 THE WITNESS: Correct. So, I was
19 retained to consult with the law firm in the
20 case. And over the course of the discussions,
21 and additional research as to what kind of
22 data was available in the marketplace, what

1 led out of that was getting data from Nielsen
2 SportsOneSource.

3 JUDGE SIPPEL: That's okay.

4 THE WITNESS: I mean, that's -- it
5 was -- there wasn't any -

6 JUDGE SIPPEL: That wasn't spelled
7 out in your agreement, though, was it?

8 THE WITNESS: No.

9 JUDGE SIPPEL: Did you have a
10 written agreement that says that you're
11 retained for purposes of, let's say, providing
12 interpretation for data that's been analyzed
13 by Dr. Gatseos? Anything to that effect,
14 something like that, or is it -- I mean, I
15 just want to get an understanding as to what
16 you were hired to do.

17 THE WITNESS: Well, Media
18 Evaluation Partners, that I specifically was
19 retained to consult with the law firm on
20 behalf of Comcast. And it was a fairly
21 straightforward letter of engagement that just
22 simply specified that the firm is -- that my

1 firm is being retained, and my services were
2 being retained.

3 JUDGE SIPPEL: And who's letter
4 was it? Was it Comcast's letter to you, or
5 the attorney's letter to you, or you to them?

6 THE WITNESS: I'd have to go back
7 and check, but I think it was my standard
8 retainer letter, which basically just says my
9 services are being retained to provide
10 consulting, and possibly testimony related to
11 - and then the case would have been named.

12 JUDGE SIPPEL: Okay. Mr. Kim, I'm
13 sorry.

14 MR. KIM: Thank you, Your Honor.
15 If I could just clear up one thing that I
16 think you raised.

17 BY MR. KIM:

18 Q His Honor was asking you questions
19 about whether you had the ability to change
20 the questions. Did you have that ability?

21 A Yes.

22 Q The question that you analyzed

1 was, "What team do you tend to follow the
2 most?" Is that correct?

3 A In the Major League Baseball
4 surveys, yes.

5 Q And you thought that was the key
6 question. Correct?

7 A In the end, after looking at the
8 whole survey, it was the one that matched up
9 best with the consumer expenditure data. And,
10 therefore, was the -- those were the data
11 points that I used. That is correct.

12 Q So you agree, you thought that was
13 the key question.

14 A Ultimately, at the end of the day,
15 yes.

16 Q You didn't even consider asking
17 another question, "Would you want to watch
18 Orioles games on TV?" Correct?

19 A Could I have that question read
20 back? I just want to make sure I answer it
21 properly.

22 Q Sure. This is not that easy with

1 this court reporting system, so let me try
2 asking it again.

3 JUDGE SIPPEL: Go ahead.

4 BY MR. KIM:

5 Q Isn't it true that you didn't even
6 consider asking another question, "Would you
7 want to watch Orioles games on TV?"

8 A I'm just trying to recall if it
9 was something that was discussed along the way
10 to phrase the question in that way. I don't
11 think so.

12 Q Isn't it true the answer is no,
13 you did not?

14 A Well, the question was not asked.
15 That's correct.

16 Q Isn't it true you did not consider
17 asking that question? Let me refresh your
18 recollection. During your deposition, page
19 140, line 12. "Question: Did you consider
20 putting on the survey the question, "Would you
21 want to watch Orioles games on television?"
22 Answer: No. The goal of the study was to

1 determine the level of fan interest, and that
2 is what I expressed to Pete when he proposed
3 the initial set of questions, that that was
4 the goal of the study, and so that -- the
5 questions were phrased to determine that." Do
6 you recall giving that answer?

7 A I do.

8 Q Mr. Gerbrandt, is it your opinion
9 that people only want to watch on TV the team
10 they follow the most?

11 A No.

12 Q In fact, my daughter plays three
13 sports, Mr. Gerbrandt. She plays soccer, she
14 plays basketball, and she plays tennis. If
15 soccer is the sport that I follow the most,
16 would you reasonably conclude that I'm going
17 to go to my daughter's tennis games, or
18 basketball games?

19 MR. KIRK: Objection; relevance.
20 The question didn't talk about different
21 sports, Your Honor. It was limited to Major
22 League Baseball. This is comparing apples to

1 oranges.

2 MR. KIM: Your Honor, this is an
3 expert -

4 JUDGE SIPPEL: No. I'm going to
5 allow -

6 MR. KIM: This is an expert
7 witness.

8 JUDGE SIPPEL: I know. Are we
9 talk -- I understand where he's going with
10 this, so I'm going to overrule the objection.
11 Go ahead.

12 THE WITNESS: Well, this is why we
13 don't mother-in-law research. This is why you
14 ask a -- you don't rely on one specific
15 hypothetical. You ask several hundred people
16 a question.

17 BY MR. KIM:

18 Q Can you answer my question, Mr.
19 Gerbrandt?

20 A If you -- obviously, I haven't
21 answered it, so if you ask it again, I'll try.

22 Q Sure. My daughter plays three

1 sports, basketball, soccer, and tennis. I
2 will tell you that soccer is a sport that I
3 follow the most. Would you conclude that I
4 don't go to her tennis games, and I don't go
5 to her basketball games?

6 A I think we're talking about
7 television here, and not your parental -- and
8 not someone's parental obligations, or
9 parental interest.

10 Q So, you believe that question is
11 entirely irrelevant. Correct?

12 A I'd want to consider it in
13 context, but, again, we weren't asking them to
14 consider different sports. We were asking
15 them about their interest in specific teams.

16 Q Okay. Let me ask that
17 hypothetical, then. I'll represent to you
18 that I'm a New York Giants fan. I also like
19 to watch games of the division rivals, Eagles,
20 and the Cowboys, hopefully, to see them lose.
21 Under your analysis, would I have no interest
22 in watching any other team than the team that

1 I follow the most on TV, the Giants?

2 A No, but you would have still
3 responded properly to the question of which
4 team you followed the most, I presume, if you
5 responded to the question correctly, honestly.

6 Q And that would lose the interest
7 that I have in watching their division rivals,
8 wouldn't it?

9 A It would not capture it. That's
10 correct.

11 Q Isn't it true you asked, and tried
12 to answer the wrong question?

13 A No, I think we asked the right
14 question.

15 Q Is it true that Comcast doesn't
16 want to carry a channel that nobody wants to
17 watch?

18 A Is it true that Comcast doesn't
19 want to carry a channel -- I'm trying to make
20 sure there's not a double negative in there.
21 One more time, please?

22 JUDGE SIPPEL: Let him answer --

1 let him repeat the question.

2 THE WITNESS: Okay.

3 BY MR. KIM:

4 Q In your opinion, does Comcast want
5 to carry a channel that nobody wants to watch?

6 MR. KIRK: Objection, Your Honor.
7 He's asking for Comcast's opinion.

8 MR. KIM: Your Honor, he's an
9 expert. He's been offered here to testify as
10 to a lot of matters. I'm entitled to probe
11 his expertise, and his opinion.

12 JUDGE SIPPEL: Well -

13 MR. KIRK: His objection, not
14 Comcast's.

15 MR. KIM: And these objections,
16 quite frankly, are -

17 JUDGE SIPPEL: Well, I think -- I
18 mean, the same answer would be with, if you
19 were asking him for what -- a cable company,
20 does the cable company want to take
21 programming that nobody wants to watch, or
22 something like that. I'm sorry. I'm mumbling

1 here. Does a cable company want programming
2 that nobody wants to watch? Is that,
3 basically, what you're asking?

4 MR. KIM: Correct. Sure.

5 THE WITNESS: I'm having trouble
6 figuring out a scenario in which they would
7 want to carry a channel that nobody wanted to
8 watch.

9 JUDGE SIPPEL: Maybe there is no
10 such scenario. That's always a possibility,
11 isn't it?

12 THE WITNESS: Well, it -- there
13 are -- when it comes to programming, it's
14 always a sliding scale. Do you -- they would
15 want to carry a channel on which there was --
16 here's what cable operators have told me, and
17 what I've observed, is that their decision for
18 carrying a channel is actually based far more
19 on trying to find under-served niches amongst
20 their subscriber base. So, they've already
21 filled an awful lot of -- they've sold a lot
22 of subscriptions. When they're evaluating a

1 channel, they're looking for a channel that
2 allows them to go after a brand new set of
3 customers, or to retain an existing group of
4 customers by satisfying them better.

5 JUDGE SIPPEL: That's a very
6 complicated answer to a very simple question.
7 Do you understand the question?

8 THE WITNESS: Sure. I think as I
9 said early fan interest is a precursor -- fan
10 -- fans are a -- provide the pool for
11 viewership. So a channel event -- so I guess
12 the negative of that is that a -- if there was
13 no interest in the channel, I'd be hard-
14 pressed to see why a cable operator would want
15 to carry it.

16 BY MR. KIM:

17 Q Isn't it true that MVPDs like
18 Comcast care about viewership?

19 A They care -- it all depends on how
20 you measure viewership. Do they care about
21 ratings, per se? No. They care about
22 components of ratings, how people are watching

1 the pattern of viewership, especially the
2 demographics of the viewership. So do they
3 care about viewership just generically? I'm
4 not sure I can answer that question. Do they
5 care -- I know that they don't look at ratings
6 specifically in making carriage decisions.
7 They look at components of ratings.

8 Q Isn't it true that they're trying
9 to anticipate viewership in making a carriage
10 decision? Do those words sound familiar, Mr.
11 Gerbrandt?

12 A Yes.

13 Q They're your words, aren't they?

14 A They are.

15 Q So would you agree with yourself
16 today that MVPDs like Comcast are trying to
17 anticipate viewership in making a carriage
18 decision?

19 A Yes.

20 Q MVPDs like Comcast also care about
21 ratings, don't they?

22 A In an abstract way and as I think

1 I just testified, they care about the
2 components of ratings, patterns of viewership
3 as opposed to the ratings themselves.

4 Q Do you recall being asked the
5 following question in the NFL case; question,
6 "My question was, do they care, do they care
7 if their channels have higher ratings as
8 opposed to lower ratings"? Answer; "Yes, they
9 do care". Do you recall getting that question
10 and giving that answer?

11 A I don't think that was my complete
12 answer, but --

13 Q Are you questioning whether that
14 was your complete answer?

15 A In a series of questions. Are you
16 talking about testimony I gave here?

17 Q Yes, sir.

18 A Yeah, I was talking about ratings
19 components.

20 Q We'll refer to that back to the
21 break. That permits Comcast in addition to
22 satisfying viewers, to make more money from

1 its advertisers, correct?

2 A They do have -- they do have local
3 ad sales, that is correct.

4 Q And that's important to Comcast,
5 isn't it, for higher ratings?

6 A For certain channels, yes.

7 Q Now, you don't know how the fan
8 interest that you measured correlates to
9 actual viewership, correct?

10 A That is correct.

11 Q Not for the MLB merchandise sales,
12 true?

13 A That is correct, I don't know how
14 the merchandise sales correlates to
15 viewership, that's correct.

16 Q You also don't know how the phone
17 survey correlates to viewership, correct?

18 A That is correct.

19 Q And the same thing is true for the
20 online survey you conducted, right?

21 A Other than the fact that fan
22 interest, which is what the survey was

1 intended to measure, fans provide the pool
 2 from which viewership ultimately springs. So
 3 you have to start with an interest in a
 4 particular subject to ultimately have
 5 viewership, but how it correlates, and we had
 6 this long discussion at the deposition as to
 7 whether you could predict the specific Nielsen
 8 rating from the survey. No, but fan interest
 9 is the fundamental precursor to viewership.

10 MR. KIM: Move to strike, your
 11 Honor, as non-responsive.

12 JUDGE SIPPEL: Yeah. You have to
 13 listen to listen very carefully to the
 14 question asked and do not volunteer anything.

15 THE WITNESS: I thought I was
 16 trying to answer but --

17 JUDGE SIPPEL: Sir, you were
 18 volunteering information that you hadn't been
 19 asked about. This is cross examination. Mr.
 20 Kirk will be able to redirect you later. Just
 21 remember who you're -- you're facing cross
 22 examination. This is -- so, go ahead.

1 BY MR. KIM:

2 Q Mr. Gerbrandt, isn't it true that
3 you have no idea how the fan interest that you
4 measure in the online survey correlates to
5 actual viewership?

6 A Correct.

7 Q And you don't know of any studies
8 that correlate fan interest like the type you
9 measured to actual viewership, correct?

10 A Correct.

11 Q You believe that consumers
12 frequently demand things that they think they
13 want and then when they get them, they realize
14 they're no longer interested, right?

15 A Generically, yes.

16 Q You understand that this is a
17 discrimination case, correct?

18 A I understand that that's one of
19 the legal issues, correct.

20 Q Okay. Did you do any research or
21 analysis into whether Comcast is treating MASN
22 differently from Comcast owned RSNs?

1 A I did not.

2 Q Do you know what the demand is for
3 Comcast SportsNet Mid-Atlantic in any region
4 across its footprints?

5 A I do not.

6 Q Do you know what the demand is for
7 Comcast SportsNet Philadelphia in any region
8 across its footprints?

9 A I do not.

10 Q In fact, you don't even know what
11 their coverage amounts are, do you?

12 A Correct.

13 Q And you weren't even sure when we
14 spoke during our deposition about what sports
15 pro teams -- sorry, what pro sports teams they
16 even carry, correct?

17 A We're talking about CSN Mid-
18 Atlantic? Are we talking about Comcast?

19 Q Yes, sir.

20 A That is correct.

21 Q And Comcast SportsNet Philadelphia
22 too, correct?

1 A That is correct.

2 Q Because Comcast never asked you to
3 study the demand for those products, true?

4 A That is correct.

5 Q The opinions that you offer in
6 this case about reported fan interest, you
7 drew those from rank order, correct?

8 A Yes.

9 Q You just looked at the rank
10 orderings from the surveys that you ordered to
11 be commissioned, right?

12 A That and the merchandise sales,
13 correct.

14 Q Okay, but the merchandise sales,
15 you just rank ordered those, too, right?

16 A Well, they were rank ordered in a
17 couple of different ways, both in terms of
18 actual -- they were -- they came to me rank
19 ordered in terms of net units and merchandise
20 and then we -- I also converted those into
21 percentages but ultimately they were all rank
22 ordered, that's correct.

1 Q When you talk about rank ordering,
2 you're talking from like 1 through 10,
3 correct?

4 A That is correct, although they had
5 individual -- that's why we did the
6 percentages, so you could see the relative
7 level of -- the relative level of sales as
8 well as just a pure rank ordering. So they
9 were presented both ways.

10 Q Okay, but you didn't measure the
11 relative levels, correct?

12 A Well, that's what a percentage
13 does.

14 Q Did you measure the relative
15 levels, sir?

16 A I calculated them, yes.

17 Q Did you measure the relative
18 levels, sir?

19 A Yes. I mean, that's what a
20 calculation is intended to do, is to actually
21 measure the relative level of sales.

22 Q Is your opinion based upon any

1 deviations in those relative levels?

2 A I did not conduct statistical
3 analyses of the standard deviation of any of
4 them, that is correct.

5 Q In fact, all you looked at was the
6 rank order for each of the surveys and the MLB
7 sales, correct?

8 A And the relative proportions.

9 Q We'll get there. Would you agree
10 with me that not a single statistical expert
11 in the world would stand behind your rank
12 ordering analysis as being reliable?

13 A I don't know.

14 Q Isn't it important to determine
15 whether results are statistically significant?

16 A It can be in certain
17 circumstances. Not when you're dealing with
18 millions of dollars of actual sales that have
19 actually taken place in the marketplace. It's
20 not a -- it's not a -- it is the actual data
21 from the marketplace.

22 Q So what's your answer, sir, yes,

1 no, I don't know?

2 A I apologize if I didn't answer the
3 question. I will try once again. If you'll
4 ask the question, I'll try to answer it.

5 Q It's much easier of we just do it
6 the first time.

7 A Well, I'm trying to understand the
8 questions.

9 Q Is it important to determine
10 whether results are statistically
11 significantly?

12 A In certain circumstances, yes.

13 Q And that's because you need to
14 make sure the results are not just a product
15 of dumb luck, correct?

16 A That is correct.

17 Q If I flip a coin three times and I
18 get heads each time, would you conclude that
19 it will always flip heads?

20 A No.

21 Q Would you conclude that the
22 correct rank order for future outcomes is

1 heads first, tails second?

2 A No.

3 Q And that's because three out of
4 three times is not statistically significant,
5 correct?

6 A Not for coin flipping, no.

7 Q Suppose you have a large barrel
8 full of marbles. You reach in and you pull
9 out 20 red marbles, 17 white marbles and 15
10 blue marbles. Can you say that the rank
11 ordering of marbles in that barrel are red,
12 then white, then blue?

13 A How many were pulled?

14 Q Twenty red, 17 white and 15 blue.

15 A There are statistical tests that
16 can be applied to tell you, you know, what
17 those -- what the range of error can be but
18 I'm not a statistician, so I'm not -- I don't
19 think I can answer that question.

20 Q Isn't it true you couldn't draw an
21 inference that there are more red marbles than
22 white marbles and there are more white marbles

1 than blue marbles? That rank ordered would be
2 junk science.

3 A Probably but again, I'm not a
4 statistician.

5 Q And you never determined in all
6 your pains in this case whether any of your
7 findings were statistically significant,
8 correct?

9 A Actually, that is not correct.

10 Q Your deposition, we asked the
11 following question, you gave the following
12 answer; Question; "Did you run any analyses to
13 determine whether any of your findings were
14 statistically significant"? Answer; "I did
15 not". Do you recall being asked that question
16 and giving that answer?

17 A I do.

18 Q Do you stand by that testimony?

19 A I do.

20 JUDGE SIPPEL: Is that in this
21 package you gave us or is that someplace else?

22 MR. KIM: It is in there, your